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7
 8 **UNITED STATES DISTRICT COURT**
 9 **DISTRICT OF NEVADA**

10 SANDY HACKETT, an individual
 11 Plaintiff,
 12 vs.

Case No. 2:09-cv-02075-RLH-LRL

DEFENDANTS/COUNTERCLAIMANTS'
MOTION FOR PROTECTIVE ORDER

13 RICHARD FEENEY, an individual;
 ARTHUR PETRIE, an individual; TRP
 14 ENTERTAINMENT, LLC, a Nevada limited
 liability company, PLAYLV GAMING
 15 OPERATION, LLC d/b/a PLAZA HOTEL
 AND CASINO, a Nevada limited liability
 16 corporation; BROADWAY BOOKING
 OFFICE NYC, LTD, a New York
 17 corporation,

18 Defendants.

19 RICHARD FEENEY, an individual;
 ARTHUR PETRIE, an individual; TRP
 20 ENTERTAINMENT, LLC, a Nevada limited
 liability company, PLAYLV GAMING
 21 OPERATION, LLC d/b/a PLAZA HOTEL
 AND CASINO, a Nevada limited liability
 22 corporation; BROADWAY BOOKING
 OFFICE NYC, LTD, a New York
 23 corporation,

24 Counterclaimants,

25 vs.

26 SANDY HACKETT, an individual
 27 Counter-Defendant.

28

1 Defendants/Counterclaimants Richard Feeney, Arthur Petrie, TRP Entertainment,
 2 LLP ("TRP"), PlayLV Gaming Operation, LLC d/b/a Plaza Hotel and Casino ("PlayLV"), and
 3 Broadway Booking Office NYC, Ltd. ("Broadway") (hereinafter collectively, "Defendants"),
 4 by and through counsel, GREENBERG TRAURIG LLP, hereby move for a protective order
 5 against Plaintiff Sandy Hackett's ("Hackett" or "Plaintiff") intention to take the deposition of
 6 Defendants' counsel Mark G. Tratos ("Tratos") on May 26 or 27, 2010, (or thereafter) as set
 7 forth in Plaintiff's letter and email correspondences to Defendants' counsel, dated May 10,
 8 2010 and May 11, 2010, respectively, both attached hereto as **Exhibit 1**.

9 This Motion is made in accordance with Federal Rule of Civil Procedure 26(c), Local
 10 Rule 26-7, and is supported by the following Memorandum of Points and Authorities
 11 together with the exhibits thereto, the Declaration of F. Christopher Austin (the "Austin
 12 Decl."), the papers and pleadings on file in this action, and any oral argument that this
 13 Court may allow.

14 DATED this 24th day of May, 2010.

15 Respectfully submitted,

16 GREENBERG TRAURIG, LLP

17
 18 By: /s/ F. Christopher Austin

19 MARK G. TRATOS, ESQ.
 20 Nevada Bar No. 1086
 21 F. CHRISTOPHER AUSTIN, ESQ.
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LOCAL RULE 26-7 CERTIFICATION

Counsel for Defendant has conferred with counsel for Plaintiff in good faith in an attempt to resolve the discovery disputes raised in this Motion without the need for Court intervention and, after letter and email correspondence, and a sincere effort to do so, counsel have been unable to resolve the matter without court action. (See Austin Decl. attached hereto as **Exhibit 2**).

DATED this 24th day of May, 2010.

Respectfully submitted,

GREENBERG TRAURIG, LLP

By: /s/ F. Christopher Austin

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Immediately after filing a Motion to Compel the deposition of Plaintiff Sandy,¹ Plaintiff demanded that Mr. Tratos be deposed on the confidential and privileged communications he had with Defendant TRP. (See Exhibit 1, King Ltr. dated May 10, 2010.) This demand is improper, abusive and unwarranted.

¹ Mr. Hackett refused to sit for his deposition over six months after the commencement of this matter and after Defense counsel had engaged in significant discovery, including the production of approximately 40,000 documents and the defense of three depositions, on the allegation that Mr. Tratos and others of the firm of Greenberg Traurig represented Hackett personally on two prior matters unrelated factually or legally to the claims of the present matter. (See Mot. Compel, attached hereto as **Exhibit 3**.) The Motion to Compel, therefore, is functionally a motion for a declaration that Defense counsel is not disqualified from representation of Defendants in this matter.

1 Plaintiff claims this deposition is necessary to see whether Mr. Tratos or his firm
 2 actually represented Plaintiff and should be disqualified from representing Defendants in
 3 the instant matter. (See id.) It is not. Mr. Tratos, under penalty of perjury provided a
 4 declaration in support of that Motion to Compel clearly stating that (i) neither he nor the firm
 5 ever represented Hackett, (ii) that the general subject of the consultation and legal services
 6 provided to TRP were unrelated to the matters at issue in the present case, and (iii) that
 7 neither he nor the firm ever received any confidential communications from Hackett that
 8 could be used to harm Hackett in the present matter. Then for good measure, Mr. Tratos
 9 offered to produce the entire file in camera for the Court's review to prove his statements
 10 were true.

11 Now, Plaintiff incredulously claims that the very declaration provided by Mr. Tratos in
 12 an effort to preserve the attorney-client privilege between the firm and TRP constitutes a
 13 waiver of that privilege. (See Exhibit 1.) It does not. The Motion to Compel Hackett's
 14 deposition and declaration of the absence of any disqualifying conflict of interests does not
 15 put unrelated, prior privileged communications between TRP and its counsel at issue in this
 16 case, nor does it harm Hackett in this case. Hackett cannot claim that preventing him from
 17 accessing such unrelated, prior privileged communications would deny him of anything vital
 18 to him in this case.² Not only does he have a privilege log proving the truth of Mr. Tratos'
 19 declaration (See Defendants' Privilege Log, attached as **Exhibit 4**), he was there. He
 20 knows he never engaged Mr. Tratos or the firm; he knows he never paid any legal bills. He
 21 knows he never sought nor received any legal counsel, nor disclosed any confidential
 22 information. He knows Mr. Tratos' declaration is truthful. He knows the subject matter of
 23 those earlier cases is not related to the present matter and that he has not been prejudiced
 24 in the instant case by any information he provided in those earlier matters.

25
 26 ² The Ninth Circuit Court has adopted a three-prong test for waiver, stating that "an implied waiver of the
 27 attorney-client privilege occurs when (1) the party asserts the privilege as a result of some affirmative act,
 28 such as filing suit; (2) through this affirmative act, the asserting party puts the privileged information at issue;
 and (3) allowing the privilege would deny the opposing party access to information vital to its defense." Home
Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1326 (9th Cir. 1995) (citing Hearn v. Rhay, 68 F.R.D.
 574, 581 (E.D. Wash. 1975)).

1 His demand to depose TRP's counsel is without merit and should be rejected. For
 2 these reasons, Defendants respectfully request that this Court enjoin Plaintiff from taking
 3 the deposition of Defendants' counsel.

4 **II. DISCUSSION**

5 Under FED. R. CIV. P. 26(c), a court may grant a protective order "for good cause...to
 6 protect a party or person from annoyance, embarrassment, oppression, or undue burden or
 7 expense, including one or more of the following: (A) forbidding disclosure or
 8 discovery;...(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or
 9 discovery to certain matters." Here, Plaintiff is not entitled to take the deposition of
 10 Defendants' counsel, Mark Tratos, because the information sought through the deposition
 11 is privileged, and neither Defendants nor their counsel have waived any privilege.

12 **A. Defendants' Counsel Should Not be Deposed Because the Information** 13 **Sought is Protected by the Attorney-Client Privilege.**

14 This Court should not allow Plaintiff to take the Deposition of Defendants' counsel
 15 because the purpose of the deposition is to require Mr. Tratos to disclose prior confidential
 16 client communications. (See Exhibit 1). The communication between an attorney and
 17 client has long been recognized as confidential, and the attorney-client privilege is one of
 18 the oldest of the privileges for confidential communications under the common law. Upjohn
 19 Co. v. United States, 449 U.S. 383, 389 (1981). Nevada has codified the attorney-client
 20 privilege in NRS 49.095, which states that a client has a privilege to refuse to disclose, and
 21 to prevent any other person from disclosing, confidential communications between the
 22 client and the client's lawyer. NRS 49.105 states that the client holds the privilege, and
 23 where a company is the client, the privilege may be claimed by the "successor, trustee or
 24 similar representative of a corporation, association or other organization, whether or not in
 25 existence." Additionally, the Nevada Rules of Professional Conduct prevent any disclosure
 26 of information obtained by an attorney in the course of representing a client. Specifically,
 27 "[a] lawyer shall not reveal information relating to representation of a client unless the client
 28 gives informed consent." See NEV. RULES OF PROF'L CONDUCT R. 1.6.

Moreover, while under the Federal Rules of Civil Procedure, Rule 30(a), a party is not absolutely prevented from taking the deposition of an opposing party's counsel, this practice is discouraged. FRCP 30(a). The Supreme Court of the United States has indicated that deposing an opposing party's counsel causes the standards of the profession to suffer and it is disruptive to the adversarial nature of the judicial system. See Hickman v. Taylor, 329 U.S. 495, 513 (1947). Courts have also held that deposing an opposing party's counsel inherently constitutes an invitation to harass the attorney and parties, and to disrupt or delay the case. West Peninsular Title Co. v. Palm Beach County, 132 F.R.D. 301, 302 (S.D. Fla. 1990); In re Arthur Treacher's Franchisee Litigation, 92, F.R.D. 429, 437 (E.D. Pa. 1981).

In Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986), the Eighth Circuit Court of Appeals set forth a three-prong standard for taking the deposition of opposing counsel which has been widely adopted by courts in other circuits, including courts in the Ninth Circuit. See Graff v. Hunt & Henriques, et al., 2008 WL 2854517, at *1 (N.D. Cal. July 23, 2008); Massachusetts Mutual Life Insurance Co. v. Cerf, 177 F.R.D. 472, 478-9 (N.D. Cal. 1998). In fact, the Court in Cerf stated that Shelton "is generally regarded as the leading case on attorney depositions," and set forth the rule that the circumstances under which a court should order the taking of opposing counsel's deposition "should be limited to where the party seeking to take the deposition has shown that (1) no other means exist to obtain the information than to depose opposing counsel³; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." Cerf, 177 F.R.D. at 479 (citing Shelton, 805 F.2d at 1327).

Applying the Shelton test, the court in Graff granted the plaintiff's motion for a protective order preventing plaintiff's counsel from being deposed in the case. Graff, 2008 WL 2854517, at *1. There, the court held that "[b]ecause Defendants have failed to identify

³ Here the Court noted that Shelton relied upon a decision from a state court in California to establish the first prong of the test. Specifically, in Fireman's Fund Ins. Co. v. Superior Court, 140 Cal. Rptr. 677, 679 (Cal. Ct. App. 1977), the court held that taking the deposition of an opposing party's counsel should be severely restricted, and permitted only upon showing of extremely good cause.

1 any relevant information which they can only obtain by deposing Plaintiff's counsel, the
2 Shelton criteria are not met and requiring Plaintiff's trial counsel to submit to a deposition
3 imposes an undue burden on Plaintiff." Id. at *2.

4 Here too, the Shelton standard for taking the deposition of Defendants' counsel is
5 not met. First, there is another means by which Plaintiff can obtain the information he
6 seeks without deposing Defendants' counsel; specifically, himself. In the May 10, 2010
7 letter to Defendants' counsel, Plaintiff's counsel claims that Plaintiff is entitled to
8 Defendants' privileged attorney-client communications, and complains of two instances
9 where Plaintiff alleges he was individually represented by Defendants' counsel. (See
10 Exhibit 1). The first is an alleged pre-formation of TRP meeting in 2002 between Tratos,
11 Feeney, Petrie and Hackett, and the second is Defendants' counsel's representation of
12 TRP in the consolidated Barton/Maraville case. (See id.) Plaintiff was in attendance at the
13 alleged meeting in 2002, and he was a named party in the Barton/Maraville case. As set
14 forth in the Motion to Compel the Deposition of Hackett and affirming the absence of any
15 conflict with Defense counsel, Defense counsel's representation in both matters was only of
16 TRP, thereby making the attorney-client communications in those matters privileged.
17 Nevertheless, Hackett can certainly come forth with any materials and information he has
18 regarding his own involvement in those matters. In fact, he has repeatedly been invited to
19 do just that but has failed to produce anything. (See Tratos Decl., Exhibit 2 to Defendants
20 Mot. Compel, attached as Exhibit 3.) That is because he has nothing to substantiate his
21 false claim that he was ever represented by the firm or Mr. Tratos, ever provided any
22 confidential information, or could ever be harmed or prejudiced in this case by any alleged
23 information he provided in the former matters. (See id.)

24 Second, the information sought is privileged as between Defendants' counsel and
25 TRP. Again, as set forth in greater detail in the Motion to Compel, even taking as true for
26 the purposes of argument Plaintiff's allegation that the 2002 meeting between Tratos,
27 Feeney, Petrie and Hackett took place prior to the formation of TRP, the advice sought and
28 given by Tratos related to TRP, not to any of the individuals. (See id.) Courts have held

1 that the "entity rule" - the doctrine that representation of an entity does not automatically
2 entail representation of its members - applies retroactively to the seeking of legal advice in
3 furtherance of the formation of a corporation. See, e.g., Jesse by Reinkecke v. Danforth,
4 169 Wis.2d 229, 241 (Wis. 1992). For example, in Danforth, the court held that where a
5 person retains a firm for the purpose of organizing an entity, the firm's involvement is
6 directly related to that purpose, and when that entity is ultimately incorporated, the entity
7 rule retroactively applies. Id. In the instant case, the representation was solely of the
8 corporate entity TRP; therefore, the communications are protected under the attorney-client
9 privilege. Even if Hackett was a member of TRP at the time, he is not anymore; thus,
10 TRP's privilege is currently held by the remaining members, Feeney and Petrie. While
11 Hackett is free to bring forth information or knowledge he has regarding any meeting that
12 he attended, he may not seek to force Defendants' counsel to waive TRP's privilege by
13 submitting to a deposition on unrelated matters.

14 Additionally, Defendants' counsel was representing TRP and TRP's interests in the
15 Barton/Maraville case. (See Tratos Decl., Exhibit 2 to Mot. to Compel, attached as Exhibit
16 3.) The general rule in Nevada and elsewhere is that "a lawyer representing a corporate
17 entity represents only the entity, not its officers, directors, or shareholders, and not any
18 related entities such as parents, subsidiaries or sister companies." Waid v. Eighth Judicial
19 District Court, 119 P.3d 1219, 1223 (Nev. 2005); see also, Burnett v. Rowzee, 2007 WL
20 2767936, at *5 (C.D. Cal.) (the rule is that an attorney can represent a corporation in a
21 dispute against a former officer from whom he received confidential information).
22 Moreover, notwithstanding whether confidential information was actually acquired by the
23 attorney, for disqualification to be appropriate, the attorney must have in fact previously
24 represented the individual party who is now seeking disqualification. See Waid, 119 P.3d
25 at 1223. Here, Defendants' counsel never represented Hackett in his individual capacity,
26 making the communications sought by Plaintiff between Defendants' counsel and TRP
27 regarding that case privileged, and the privilege is held by TRP and it's current members,
28 Feeney and Petrie.

1 Third, the information sought by Plaintiff is not crucial to the underlying case at
2 hand. The entirety of Plaintiff's focus here has nothing to do with the merits of the case and
3 everything to do with a tactical maneuver to attempt to unfairly harm and prejudice
4 Defendants. Even if the Court were to find Plaintiff's claim that he was represented in one
5 or both of the prior matters by Defendants' counsel was somehow reasonable, despite the
6 absence of evidence to support that claim, Plaintiff would still have to demonstrate that
7 such representation harms him in this matter. See Nevada Yellow Cab Corp., 123 Nev. at
8 50, 152 P.3d at 741. He cannot. As set forth in the Motion to Compel, the prior matters are
9 not substantially related to the issues in the present case such that it is unlikely Plaintiff
10 would even have disclosed any confidential information related to the instant case, and
11 Defendants' counsel in fact did not obtain any confidential information from Hackett in those
12 matters that is relevant to the issues in the present litigation. (See Tratos Declaration,
13 Exhibit 2 to Motion to Compel, attached as Exhibit 3). As such, Plaintiff would not be, and
14 is not, harmed by the present and continuing representation of Defendants by Defense
15 counsel in this case, and Plaintiff knows it.

16 That is why Plaintiff has never actually moved to disqualify Defendants' counsel.
17 Rather, for over six months, Plaintiff took no action despite the continuing active
18 representation of Defendants by present counsel. Such representation included the filing of
19 several motions, the disclosure by Defendants of approximately 40,000 documents and the
20 defense of three depositions. (See Exhibit 3.) If Plaintiff were really concerned that such
21 representation could harm him, he would have moved for disqualification at the outset, as
22 he had no less information then than he did when days before his noticed deposition he
23 refused to sit for it. (See id.) His refusal, like his demand for Mr. Tratos' deposition is made
24 to delay and harass. He has not and cannot claim any actual prejudice by the continuing
25 representation of Defendants by present counsel.

26 **B. Defendants' Counsel Has Not Waived The Attorney-Client Privilege.**

27 Contrary to Plaintiff's claim, Mr. Tratos did not unintentionally and inadvertently
28 waive the very privilege he was seeking to protect by providing a declaration in support of

1 the Motion to Compel. In his May 10, 2010 letter, Plaintiff alleges that Mr. Tratos waived
 2 the attorney-client privilege held by TRP by declaration that he never represented Plaintiff
 3 in his individual capacity in any prior actions, and that the prior matters were unrelated to
 4 the instant matter. (See Exhibit 1). Plaintiff's position is misguided.

5 The Ninth Circuit Court of Appeals has adopted the standard set forth in Hearn v.
 6 Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975) for determining whether a waiver of the
 7 attorney-client privilege has occurred. See Home Indem. Co. v. Lane Powell Moss & Miller,
 8 43 F.3d 1322, 1326 (9th Cir. 1995); see also U.S. v. Amlani, 169 F.3d 1189, 1195 (9th Cir.
 9 1999). Under the Hearn test, "an implied waiver of the attorney-client privilege occurs
 10 when (1) the party asserts the privilege as a result of some affirmative act, such as filing
 11 suit; (2) through this affirmative act, the asserting party puts the privileged information at
 12 issue; and (3) allowing the privilege would deny the opposing party access to information
 13 vital to its defense." Home Indem. Co., 43 F.3d at 1326 (citing Hearn, 68 F.R.D. at 581).
 14 "In Hearn, an overarching consideration is whether allowing the privilege to protect against
 15 disclosure of the information would be 'manifestly unfair' to the opposing party." Id.

16 Here, Defendant's "affirmative act" of filing a Motion to Compel, supported by a
 17 declaration saying neither Mr. Tratos nor the firm represented Hackett nor advised him on
 18 any matters related to the present case, does not constitute an assertion of the prior,
 19 unrelated, privileged communications between TRP and its counsel, nor does it put such
 20 communications at issue. What is at issue are the communications had with Hackett on
 21 Hackett's individual behalf, and as set forth in Mr. Tratos' declaration, supported by the
 22 privilege log, there were no confidential communications with Hackett on Hackett's
 23 individual behalf nor were there any communications with Hackett that were substantially
 24 related to the claims of the present case. Mr. Tratos and the firm represented TRP only in
 25 those prior matters, and then only on claims unrelated to the present conflict. (See Tratos
 26 Decl., Exhibit 2 to Mot. Compel, attached as Exhibit 3.)

27 Even if the Motion to Compel or Mr. Tratos' declaration in support of it had
 28 affirmatively put the prior, privileged communications between TRP and its counsel into

1 issue, thereby satisfying the first and second prongs of the Hearn test, the third prong
 2 would not be satisfied because the privileged information is not sufficiently vital to Plaintiff's
 3 claims. If Plaintiff was present for the alleged confidential communications, as he claims, or
 4 if Plaintiff had in fact engaged Defense counsel, as he claims, he would have the
 5 information he seeks and could produce it. He does not and he has not.

6 Moreover, as an aid to Plaintiff, Defendants have (1) even provided Plaintiff with a
 7 privilege log describing the nature of the confidential and privileged
 8 documents/communications in sufficient detail to show the absence of any confidential
 9 communications with Hackett on any matter substantially related to the present action
 10 (Attached hereto as Exhibit 4), and (2) made all of the confidential materials at issue
 11 available to this Court for an in-camera review and inspection to verify the truthfulness of
 12 Mr. Tratos' Declaration. (See Tratos Decl., Exhibit 2 to Mot. Compel, attached as Exhibit
 13 3).

14 As such, Plaintiff cannot meet the requirements of Hern test. The declaration of Mr.
 15 Tratos does not put prior, unrelated privileged communications between the firm and TRP
 16 at issue, and Plaintiff is not harmed by having to rely on his own knowledge, now aided with
 17 a privilege log, of communications he must necessarily claim he himself made. Plaintiff
 18 should be enjoined from taking the deposition of Defendants' counsel, Mark Tratos,
 19 because the information Plaintiff seeks is privileged, has not been waived, and is not vital to
 20 Plaintiff.

21 **C. Defendants Are Entitled to Their Attorneys' Fees and Costs.**

22 Pursuant to Rule 26(c)(3) of the Federal Rules of Civil Procedure, FRCP 37(a)(5)
 23 applies to the award of expenses regarding a protective order. FRCP 37(a)(5) states:

24 If the motion is granted - or if the disclosure or requested
 25 discovery is provided after the motion was filed - the
 26 court must, after giving an opportunity to be heard,
 27 require the party or deponent whose conduct
 28 necessitated the motion, the party or attorney advising
 that conduct, or both to pay the movant's reasonable
 expenses incurred in making the motion, including
 attorneys' fees.

1 Fed. R. Civ. P. 37(a)(5).

2 In the instant case, Defendants have demonstrated that Plaintiff has no lawful basis
3 for attempting to take the deposition of Defendants' counsel, Mark Tratos. Defendants tried
4 to resolve the instant dispute without intervention from this Court, but Plaintiff rejected
5 those attempts. As such, Defendants request that this Court award them their reasonable
6 attorneys' fees and costs incurred related to filing and prosecuting this Motion.

7 **III. CONCLUSION**

8 For the reasons set forth herein, Defendants respectfully request this Honorable
9 Court grant its motion for protective order preventing Plaintiff from taking the deposition of
10 Defendants' counsel, Mark G. Tratos.

11 DATED this 24th day of May, 2010.

12 Respectfully submitted,

13 GREENBERG TRAURIG, LLP

14 /s/ F. Christopher Austin

15 Mark G. Tratos (Nevada Bar No. 1086)

16 F. Christopher Austin (Nevada Bar No. 6559)

17 Peter H. Ajemian (Nevada Bar. No. 9491)

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19 Las Vegas, NV 89169

20 Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2010, I served the foregoing
DEFENDANTS/COUNTERCLAIMANTS' MOTION FOR PROTECTIVE ORDER via the
Court's CM/ECF filing system to all counsel of record and parties as listed.

/s/Sara J. Haro

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